Office-Supreme Court, U.S.
FILED
JUL 19 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 296

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
RICHTER, LORD & LEVY,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pennsylvania.

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To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Raymond N. Heiselmoyer, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered on April 22, 1957.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found at 243 F. 2d 773 (C. A. 3, 1957). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for the respondent-defendant affirming the judgment of the United States District Court for the Eastern District of Pennsylvania where judgment was entered for respondent-defendant on the verdict.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 22, 1957. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Is not the independent brake of a locomotive an appliance within the Safety Appliance Acts pertaining to brakes [27 Stat. 531, 45 U. S. C. § 1, 45 U. S. C. A. § 1]?

II. Is not the prohibition of the Boiler Inspection Act [36 Stat. 913 as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] against "unnecessary peril" absolute, and the test of compliance therewith in no way related to negligence?

THE STATUTES INVOLVED.

1. The Safety Appliance Acts pertaining to brakes, 27 Stat. 531, 45 U. S. C. § 45, U. S. C. A. § 1, which provides as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

2. The Boiler Inspection Act, 36 Stat. 913, as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23, which provides as follows:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

STATEMENT OF THE CASE.

Petitioner had been a locomotive engineer on the Pennsylvania Railroad since 1926 (74a). While so employed he was injured on September 19, 1952, and again on July 9, 1954.

On September 19, 1952, petitioner was employed on an industrial shifter locomotive near Norristown, Pennsylvania, moving from respondent's yard to an industrial plant (105a). This is a locomotive used to shift railroad cars into plants on respondent's Trenton cutoff (75a).

The locomotive in question was a diesel electric equipped with two power brakes. One is the automatic brake which controls brakes on the entire train including the engine. The second is the independent brake which controls the brakes on the engine alone. Both brakes are air brakes (77a-78a). The handle of each power brake is located on a brake pedestal located to the engineer's left as he faces forward (78a-79a, 620a). Elsewhere in the locomotive is a third brake—a hand brake—operated manually and used when the locomotive is out of service (79a).

The engineer's seat has a detachable backrest (90a, 621a), and the whole seat works on a swivel bottom. The

seat back is made of a leather-covered plane supported by cylindrical prongs which bend to form a right angle. The prongs insert into sockets underneath the seat and a knob locks the backrest in place (80a-81a, 621a, 622a).

The seat is supposed to revolve without fouling or interruption by any nearby equipment since the engineer must be able to turn freely to his right to look from the cab window or to his left to the brake pedestal. However, the back of this seat did foul at several points in its rotation. Its leather back had been badly cut and scuffed by contact on revolution with bolts on the brake pedestal (94a). Its top was tattered from fouling with the independent brake handle (89a-90a, 94a, 619a, 620a, 621a, 623a). *That fouling interfered with and prevented the use and operation of the independent brake.* The fouling between the independent brake and seat was finally admitted by respondent at the very end of the trial (519a).

To avoid the effect of this befouled condition, engineers running the locomotive frequently removed those back rests. The condition had been complained of prior to the accident by a fellow employee of petitioner (220a).

On the day in question petitioner started the engine and then walked to the engineer's seat to remove the backrest. It came out a quarter of the way and jammed. He repeatedly pulled at it (95a). With the back rest in this position the locomotive could not be operated because the seat would not turn at all (96a-97a). He pulled further at the backrest and it finally let loose throwing him back against the cab with a terrific blow, and he buckled or sagged when he tried to break the blow (96a). A serious back injury resulted.

The jamming of the backrest was caused by sprung prongs (99a, 225a-226a). Someone other than petitioner had previously forced this backrest into crude holes which had unauthorizedly been bored into the fireman's seat. That seat does not normally have a backrest. The engi-

neer's backrest was thus used as a makeshift back on the fireman's seat (99a-100a, 103a-104a).

This accident and the suit arising from it constitute the subject of this Petition.

Petitioner tried his case on three theories:

(1) The independent brake was a statutory safety appliance which, because of its befouled condition, violated § 1 of the Safety Appliance Act. The Trial Judge refused to so charge, and it was held and affirmed that the independent brake is not a statutory safety appliance.

(2) The independent brake was also an "unnecessary peril" in violation of the Boiler Inspection Act. This was never submitted by the Trial Court.

(3) The engineer's seat was an "unnecessary peril" in violation of the Boiler Inspection Act. This theory was submitted on instructions of negligence law which properly have nothing to do with the Boiler Inspection Act.

Petitioner sustained a second accident for which a subsequent suit under the Federal Employers' Liability Act was brought. That second suit forms no part of this Petition save to note that both suits were consolidated, tried and submitted together.

Verdicts in both suits were returned for respondent and judgment entered thereon. On appeal to the Court of Appeals for the Third Circuit those judgments were affirmed. This Petition for a Writ of Certiorari as to the judgment in the first suit follows.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resume.

1. When new questions of importance turning on federal statutory interpretations have been placed before this Court in Certiorari proceedings it has consistently granted the Writ. *Baltimore and Ohio Railway Company v. Jackson*, — U. S. —, 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318, 76 S. Ct. 386 (1956); *Southern Pacific Company v. Gileo*, 351 U. S. 493, 76 S. Ct. 952 (1956); *Reed v. Pennsylvania Railroad Company*, 351 U. S. 502, 76 S. Ct. 958 (1956). The issues at bar are such questions.

A. An authoritative ruling is needed to decide whether a critically important braking mechanism common to great numbers of locomotives—*the independent brake*—is an appliance covered by the Safety Appliance Acts pertaining to brakes.

B. Equally needed is an authoritative ruling deciding whether the principles of negligence law are applicable in determining liability under the Boiler Inspection Act.

Both questions have incalculably broad significance for the safety of railroad employees and the general public.

2. This decision is in conflict with *Baltimore and Ohio Railway Company v. Jackson*, — U. S. —, 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318, 76 S. Ct. 386 (1956); *Great Northern Ry. Co. v. Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616 (1918); *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 415 (1943); *Baltimore & O. R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1924).

3. This decision is in conflict with the decisions of the Court of Appeals of the Second Circuit in *Lehigh Valley R. Co. v. Beltz*, 10 F. 2d 74 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926) and *Lehigh Valley R. Co. v. Huben*, 10 F. 2d 78 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926).

4. This decision is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. A. 7, 1946) cert. den. 329 U. S. 812, 67 S. Ct. 635 (1947).

5. This decision is in conflict with the decision of the Supreme Court of Missouri in *Banta v. Union Pac. R. Co.*, 242 S. W. 2d 34 (Mo., 1951).

6. This decision, unless corrected, will frustrate the clear congressional purpose underlying both statutes by denying their remedies and protection to railroad employees and the public and will invite much additional litigation and appeals especially as to the "unnecessary peril" doctrine.

ARGUMENT.

Point I.

The Independent Brake Is a Safety Appliance Within § 1 of the Safety Appliance Acts [27 Stat. 531, as Amended, 45 U. S. C. §§ 1-16, 45 U. S. C. A. §§ 1-16] Petitioner Was Therefore Entitled to Have the Question of That Brake's Violation of the Safety Appliance Act Either Answered Affirmatively as a Matter of Law or at Least Submitted to the Jury.

The judgment below originates in what is necessarily the Court of Appeals' prejudicially erroneous conclusion that the independent brake is not within the coverage of Section 1 of the Safety Appliance Acts [27 Stat. 531, 45 U. S. C. § 1, 45 U. S. C. A. § 1]. That this must be its source assumes a framework in which the case was tried by petitioner, and it should be made explicit at the outset of the argument.

Petitioner's case was tried on these theories:

(1) The contact that the engineer's seat had with the independent brake valve rendered the independent brake violative of the Safety Appliance Acts. The theory was submissible, of course, if the independent brake is covered by § 1 of the Safety Appliance Acts. How this substantial question of statutory construction was erroneously treated below is the gist of "Point I," and the error generates such conflict and harmful consequences as to warrant the grant of the Petition on this issue alone.

(2) The condition of the engineer's seat rendered it an "unnecessary peril" in violation of the Boiler Inspection Act [36 Stat. 913, as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23]. The theory was submitted to the jury on an instruction which charged a test of "unnecessary peril" in conflict with ruling law. The

construction of "unnecessary peril" is the gist of "Point II," *infra*. It too, standing alone, warrants the grant of the Petition.

(3) In the context of an area where the seat contacted the valve of the independent brake in such dire manner as to prevent stopping of the locomotive, such a defectively operating *independent brake* was also an "unnecessary peril" within the meaning of the Boiler Act. This vital and primary theory of liability in the case was not submitted as such, and that failure is treated in the Argument in "Point II", *infra*.

Within this framework we turn then to the question of whether the independent brake is covered under § 1 of the Safety Appliance Acts.

The District Judge was repeatedly apprised both by counsel and the evidence of petitioner's position that the contact between the engineer's seat and the independent brake valve was a violation of the brake provision of the Safety Appliance Acts and submissible as such (64a-65a, 77a, 79a-80a, 89a-90a, 228a, 238a, 341a, 565a-566a, 551a-552a). He squarely held in his opinion denying petitioner a new trial that the *independent brake*, where serving as an auxiliary power driving-wheel brake, is not a safety appliance within the meaning of 45.U. S. C, § 1 (611a).

With considerably less candor, the Court of Appeals came to the same conclusion. Because of its extraordinary importance the question deserved more responsible treatment than it was accorded there. That Court arrived at its judgment by three distinct approaches, none of which can withstand even cursory analysis.

First: In substance, the Court of Appeals attempts to relegate Petitioner to a limbo populated by after-thinking unsuccessful lifigants.[1] Its characterization of the record[2]

1. All subsequent references to the opinion of the Court of Appeals are to the opinion as paginated in the "Appendix" *infra*, p. 24.
2. Pp. 24-25.

is not fair.[3] Having cast petitioner in this role, the Court then states:[4]

> "This and requests to charge with exception to their denial are the only references prior to verdict of a contention of a defective brake as such."

Even if these were the first and only occasions on which the Trial Court was apprised of petitioner's theory, they would have been the perfectly proper and complete manner in which to have the issue raised and passed upon either as a matter of law or at least submitted to the jury. This is exactly what requests for charge are meant to do. Unless the Court of Appeals below is trying to unseat Rule 51 of the Federal Rules of Civil Procedure,[5] we discern no purpose in its occult phrase: ". . . the *only references prior to verdict* of a contention of a defective brake as such."[6] (Emphasis supplied.)

Second: The Court of Appeals states that in the course of petitioner's motion for a new trial this issue of statutory coverage was "closely argued". It was. It then says that: "It appeared highly questionable that the auxiliary independent brake . . . ."[7] was within the statute. Whether

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3. 64a-65a, 77a, 79a, 80a, 89a-90a, 228a, 238a, 341a, 565a-566a, 551a-552a.

4. P. 24.

5. The Rule provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

6. P. 24.

7. P. 25.

highly questionable or not, what the Court of Appeals studiously avoided observing is that the District Judge crucially held that such a brake was *not* a statutory safety appliance (611a). Yet petitioner certainly raised the error of that holding in the appeal below. Although the Court of Appeals may feel that its mincing reference can end the matter by somehow avoiding it, the decision-making processes of a precedent-building jurisprudence do not so function. Assuredly the bench and bar will accurately cite and apply the opinion of the Court of Appeals for the erroneous exculpating proposition enunciated by the District Court whose judgment the Court of Appeals roundly affirmed: that the independent brake is not a safety appliance within Section 1 of the Safety Appliance Acts. That issue of first impression is now before this Court.

Third: In the course of its gingerly treatment of the issue, the Court of Appeals stated that the auxiliary independent brake ". . . was not known when this particular part of the law was adopted. . . ."[8] The only fair meaning to be given that statement is that only those appliances extant at the time Section 1 was enacted are comprehended by it.

There are two crushing answers to this view of the Court of Appeals. Both were authoritatively provided by this Court in the present term in *Baltimore and Ohio Railway Company v. Jackson,* U. S. , 77 S. Ct. 842 (1947), and *Shields v. Atlantic Coast Line Railroad Company,* 350 U. S. 318, 76 S. Ct. 386 (1956). In *Jackson,* petitioner railroad and the Interstate Commerce Commission as *amicus curiae* argued in the same tenor that a motor track car powered by a gasoline engine that was towing a push truck on petitioner's tracks was not within the coverage of the Safety Appliance Acts urging, *inter alia,* that for over sixty years the I. C. C. had not considered such vehicles within the Acts and that therefore Congress did not intend them

8. *Ibid.*

to be covered. This Court per Mr. Justice Clark rejected the argument for a number of reasons, notably that the ". . . plain language [of 45 U. S. C. § 8] could not have been more all-inclusive." (At Page 846.) The language of Section 1 is equally plain and inclusive. The test of coverage as laid down in the *Jackson* case is pellucid. It is not the newness of the appliance. It is not the label it carries. As Mr. Justice Clark stated at Page 845:

> "We believe that the controlling factor is the nature of the employment of the vehicles in the railroad's service, that is the type of operation for which they are being used. . . . In the light of the prime purpose of the Safety Appliance Acts, *i.e.*, the protection of employees and others by requiring the use of safe equipment, Lilly v. Grand Trunk Western R. Co., 1943, 317 U. S. 481, 486, 63 S. Ct. 347, 351, 87 L. Ed. 411, when the railroad uses this type of equipment in this manner —regardless of the label it places on the vehicles—the commands of the Acts must be obeyed. . . ."

In *Shields* the issue was whether a so-called dome-running board was an appliance within Section 2 of the Safety Appliance Act. It was held to be covered notwithstanding the I. C. C.'s argument there that such a running board had never been the subject of I. C. C. regulations promulgated under Section 3 of the Act. Mr. Justice Minton held at Page 324:

> "At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by § 2. Cf. Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33, 37, 36 S. Ct. 482, 483, 60 L. Ed. 874."

The second answer to the Court of Appeals cuts to the heart of the issue at bar and yet that Court gave it not a word of recognition. As Mr. Justice Clark held in *Jackson* at Page 847:

> "In view of the history and purposes of the Safety Appliance Acts, and the literal language used by the Congress that they embraced any car [Fn. 6] and any locomotive engine * * * hauling * * * any car, [Fn. 7] together with the practical necessity of affording safety appliances to thousands of railroad maintenance employees, as well as the public, we conclude that the motor track car and hand car when used by the petitioner in the manner employed here must be equipped in accordance with the requirements of the Safety Appliance Acts."

The ramifications flowing from the decision of the Court of Appeals are prodigious. The decision means that any devices not in existence at the time of passage of the Safety Appliance Acts, even though otherwise within the clear meaning of those Acts, cannot be covered by them. In an age of swiftly moving technological innovations in American railroads, such a view tears from countless railroad employees and the public the vital protection vouchsafed to them by these Acts of Congress. The sweep of this consideration is vast indeed. It is difficult to conceive of locomotives that are not equipped with independent brakes.[9]

The Court of Appeals in its opinion said nothing else on the question. By its arbitrary decision that Court indubitably affirmed the Trial Court's refusal to submit the issue of a violation of the brake provision of the Safety Appliance Acts. This ultimately has only one meaning: the Court of Appeals in substance holds the issue was not submissible—that is, that the independent brake is not a statutory safety appliance.

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9. See Appendices "A" through "F" which indicate the nature and widespread use of the device.

In addition to the teachings of the above-cited cases, these further factors compel a holding of coverage.

Section 1 of the Safety Appliance Act requires a "power-driving wheel brake." The language is clear. The independent brake is such a brake, and all parties and the Trial Court agreed (611a). There can be no problem on this score then.

In its arbitrariness the Court of Appeals did not even attempt to justify the Trial Judge's rationale that since the automatic brake is also a power-driving wheel brake which operates the train brake system such a brake is ". . . *the* brake contemplated and required by 45 U. S. C. § 1" (611a). (Italics supplied.) That position is, however, no more meritorious than those adopted by the Court of Appeals.

Its flaw is most clearly described in the holding of this Court in *Shields v. Atlantic Coast Line Railroad Company, supra*. The Court, per Mr. Justice Minton, held at page 324:

> "At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by § 2. Cf. Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33, 37, 36 S. Ct. 482, 483, 60 L. Ed. 874."

As a result of the decision and judgment below the requirements that air brakes function efficiently as well as that the system be not defective which are commanded by *Richmond F. & P. R. Co. v. Brooks*, 197 F. 2d 404, 91 U. S. App. D. C. 24 (C. A. D. C., 1952), cert. denied 73 S. Ct. 31, 344 U. S. 828, 97 L. Ed. 644 (1952) have been denied application. That Court held at Page 407:

"In Myers v. Reading Co., 1947, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615, the Supreme Court refers to the Safety Appliance Act in terms of *efficient* and *proper* working of the required mechanism and indicates that the inefficiency of a brake may consist not only of its defective condition but in its defective functional operation. See, also, Affolder v. New York, C. & St. L. R. Co., 1950, 339 U. S. 96, at page 98, 70 S. Ct. 509, 94 L. Ed. 683, and O'Donnell v. Elgin, J. & E. R. Co., 1949, 338 U. S. 384, 70 S. Ct. 200, 94 L. Ed. 187." (Italics supplied.)

Yet this record shows without doubt (indeed belatedly it is now conceded by respondent) that the independent brake was not functioning efficiently and properly (89a, 90a, 94a, 619a, 620a, 621a, 623a). By denying coverage to the independent brake, the Courts below have thus kept from petitioner his right to invoke the relief available to him under that statute and these cases decided thereunder.

Point II.

The Prohibition of the Boiler Inspection Act [36 Stat. 913 as Amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] Against "Unnecessary Peril" Is Absolute. The Test of Compliance Is in No Way Related to Negligence.

A.

As earlier indicated, it was petitioner's theory, that the Boiler Inspection Act [36 Stat. 913 as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] was violated as a result of the malfunction of two statutory appurtenances of the locomotive in question: (1) the seat, and (2) the independent brake. The condition of each was a proscribed "unnecessary peril" under the Boiler Inspection Act. Although the District Court charged the jury as to the *seat*, it never charged as to the independent *brake* as such. In its opinion the Court of Appeals so acknowledged in the following language at page 25:

> "Then the Court said 'If in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff.' *True the judge did not repeat this in terms of it being a jury question whether the brake was a defective appliance under the Boiler Inspection Act if there was such contact* but he had given the jury a practical formula for its guidance on the branch of the problem." (Emphasis supplied.)

Although the Court of Appeals speaks speculatively of "if there was such contact," the record speaks positively. Respondent's counsel admitted the contact (519a). A violation of the Boiler Inspection as to the independent brake should have been charged as a matter of law, leaving only the question of causation, or at least submitted precisely to the jury on the independent brake as such.

The Court of Appeals attempted to minimize the significance of that failure in the following language at Pages 25-26:

> "If the jury had concluded that contact between the seat and the brake lever had created a defective condition, irrespective of whether it was attributed to the seat or to the brake, if that condition was a proximate cause of the accident, the jury was bound to render a verdict in plaintiff's favor."

As a matter of trial realities that statement is hopelessly wrong, for the likelihood of a jury's finding an "unnecessary peril" with respect to the malfunction of a locomotive brake is vastly greater than with respect to a locomotive seat. A brake that cannot be used to avoid a wreck or running down some employee working alongside of the track is inescapably "unnecessarily perilous." The jury reaction to a sticky seat might be different. At least the jury should have been allowed to pass upon the question of the brake as such.

B.

Recalling that the second case which is not in issue here was simultaneously submitted under the F. E. L. A., the gist of which is negligence, we come now to that portion of the problem which creates the other ground for granting the Petition.

Here follows the District Court's affirmed charge on the test of what is "unnecessary peril" under the Boiler Inspection Act:

> "'I charge you, Members of the Jury, that the defendant railroad, Pennsylvania Railroad in this case, was under a duty to see that the locomotive, to which the plaintiff in this case was assigned, and its appurtenences, one of which was the seat in question, was maintained in good condition so that it could be employed in the active service of the carrier without unnecessary peril to the life and limb of the plaintiff.
>
> "'In other words, the defendant, the Pennsylvania Railroad, has an absolute and continuing duty to provide and maintain its locomotive and the attached apparatus and appurtenances so as to provide a safe place to work for its employees.
>
> "'When you say "safe," however, you must consider "safe" here and remember what sort of places and equipment the railroad has to do with. When you say "safe" in connection with a locomotive, you don't mean the same thing as you would if you used the word "safe" in connection with the parlor floor, or the front or back door of your home.
>
> "'A locomotive cannot be made "safe" in that sense. It is a piece of equipment that necessarily can injure people. So that when you talk about "safe" it is being used in connection with a locomotive and is qualified here by the statement in the section of the Boiler Inspection Act, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb;" it says, "without unnecessary peril to life or limb * * *"'" (533a-534a).

The "safe place to work" doctrine is one of the foundations of F. E. L. A. law—of negligence. It forms no part of the concept of "unnecessary peril" and the absolute liability under the Boiler Inspection Act. Under no circumstances should it be given to the jury in a case such as this, yet exactly that was done here. It was made doubly erroneous because in the same charge the District Judge instructed as to negligence under the F. E. L. A. action, and then created great jury confusion when he repeated the "safe place to work" doctrine in connection with negligence (538a).

What has until now been a statute imposing liability for any breach of its exacting requirements is now transmuted into one the breach of which is henceforward to be measured by the much more exculpatory tests for negligence of the employer under the "safe place to work" doctrine. Under negligence law a defect may exist and yet no liability be imposed on the carrier because of lack of notice or the exercise of due care under all the circumstances. Under absolute liability these are irrelevant factors and non-exculpatory.

The sum of the error is that the strict measure of care and the absolute liability mandated by the Boiler Inspection Act have been displaced and in their stead the Court of Appeals has approved the imposition on the employee of the stringent requirements of proof extant in the rules of negligence inherent in the "safe place to work" doctrine. Those for whom the statute was enacted have thus been deprived of a classic measure of protection, and the repeated holdings of this Court that the Boiler Inspection Act is to be construed liberally to effectuate its prime purpose of protecting employees and others have been frustrated and thrown into sharp conflict. The decision below effectively drains the great strength from this statute. *Great Northern Ry. Co. v. Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616 (1918); *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 415 (1943).

Until the judgment below was entered, the public as well as railroad employees had been beneficiaries of the Boiler Inspection Act. *Fairport P. & E. R. Co. v. Meredith*, 292 U. S. 589, 78 L. Ed. 1446, 54 S. Ct. 826 (1934). However, the test now sanctioned by the Court of Appeals can, of course, have no application for the traveling public: a locomotive for them is not a "place to work." Indeed it may not be a "place to work" for untold numbers of railroad employees who never get on a locomotive at all and yet would fall within the ambit of injury created as a result of an unnecessarily perilous locomotive appurtenance. Until the decision below they were surely beneficiaries of the Act. How do the bench and bar now determine the rights afforded these great classes under such a construction of the Boiler Inspection Act? Is there to be one test for men in the locomotive, a second for other railroad employees and a third for the public? To ask the question is to answer it.

C.

What this Court has ruled in connection with the Safety Appliance Acts needs to be held equally applicable to the Boiler Inspection Act: that *all* issues of negligence such as those endorsed by the Court of Appeals are totally alien to the Boiler Inspection Act. It is the needed extension of its ruling in *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1924).

In *O'Donnell v. Elgin J. & E. Railway Company*, 338 U. S. 384, 70 S. Ct. 200 (1949), this Court held at Page 204:

> "But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. St. Louis, Iron Mountain & Southern R. Co. v. Taylor, 210 U. S. 281, 294, 28 S. Ct. 616, 620, 52 L. Ed.

1061; Chicago, B. & Q. R. Co. v. United States, supra, 220 U. S. 575-577, 31 S. Ct. 615-617, 55 L. Ed. 582; Delk v. St. Louis & San Francisco R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous.' Brady v. Terminal Railroad Ass'n of St. Louis, 303 U. S. 10, 58 S. Ct. 426, 429, 82 L. Ed. 614."

See also *Carter v. Atlanta & St. Andrews Railway Company*, 338 U. S. 430, 70 S. Ct. 226 (1946).

Other appellate courts have ruled out negligence as an issue in Boiler Inspection cases. Inter-circuit conflict now exists as a result of the judgment below. *Lehigh Valley R. Co. v. Beltz*, 10 F. 2d 74 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926); *Lehigh Valley R. Co. v. Huben*, 10 F. 2d 78 (C.A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926); *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. A. 7, 1946), cert. den. 329 U. S. 812, 67 S. Ct. 635 (1947). See also *Banta v. Union Pac. R. Co.*, 242 S. W. 2d 34 (Mo., 1951) for conflict with the decision of a state court of last resort.

D.

We respectfully urge the Court that the test of what constitutes "unnecessary peril" has been fairly propounded in *Banta v. Union Pacific R. Company, supra* at 242 S. W. 2d 40 where it was held:

"The words 'unnecessary' and 'peril' are words of every day usage and common understanding. As used in this Act we see no mystery in them. 'Unnecessary', means that which is not required by the usual circumstances. 'Peril', means an exposure to injury or destruction. 'Unnecessary peril', as used in the Act, means an exposure to injury or destruction which is not required by the usual circumstances of the par-

ticular duty the employee is to perform, but which is an exposure to injury over and above that which is usually, ordinarily or necessarily incidental to the performance of the particular duty."

Using the *Banta* standard, the Trial Court should have ruled as a matter of law that the railroad was guilty of a violation of the Boiler Inspection Act insofar as the brakes were concerned. We requested such a point for charge but it was denied (564a). At the very least, the jury should have been permitted to pass upon the question. It was not. Indeed the Court virtually prevented even a jury finding to that effect when it spoke in the language of negligence.

CONCLUSION.

The case at bar is not one in which a question of the weight or sufficiency of evidence in a jury trial is sought to be placed before this Court. The issues are of an entirely different order dealing as they do with the large and important question of coverage of the independent brake under the Safety Appliance Act and the test of liability under the Boiler Inspection Act. This Court has recently recognized the eminently reviewable quality of issues certainly no larger nor any more important than those at bar in *Baltimore and Ohio Railway Company v. Jackson*, U. S. , 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318, 76 S. Ct. 386 (1956); *Southern Pacific Company v. Gileo*, 351 U. S. 493, 76 S. Ct. 952 (1956); *Reed v. Pennsylvania Railroad Company*, 351 U. S. 502, 76 S. Ct. 958 (1956).

The independent brake is a safety appliance within Section 1 of the Act, yet the Court of Appeals held contrarily. The test of "unnecessary peril" under the Boiler Inspection Act is absolutely unrelated to issues of negligence, yet the Court of Appeals endorsed a conflicting view of the test. As a result of these substantial errors petitioner has been denied the benefits of both remedial statutes enacted by Congress. Those who work and travel the nation's

railroads have been just as effectively deprived. The conflicts now obtaining as between the Court of Appeals below on the one hand and this Court as well as additional Appellate Courts on the other will breed litigation and numerous appeals unless the errors below are corrected by a grant of this Petition and reversal of judgment below.

This Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

B. Nathaniel Richter,
Seymour I. Toll,
Richter, Lord & Levy,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,044 and 12,045

RAYMOND N. HEISELMOYER,
Appellant,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued February 7, 1957

Before McLAUGHLIN, STALEY and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed April 22, 1957.)

By McLAUGHLIN, *Circuit Judge.*

Appellant claimed that while employed as an engineer by appellee railroad he sustained two separate accidents. In his complaint based on the first of these he stated that the action arose under the Federal Employers' Liability Act [1] and under the Safety Appliance Acts.[2] Later he said, "The accident hereinafter mentioned was caused by the

1. 45 U.S.C. Section 51 et seq.
2. The Boiler Inspection Act is found at 45 U.S.C. Section 23; the Safety Appliance Acts pertaining to brakes at 45 U.S.C. Section 1.

defendant's violation of the Boiler Inspection Act." He went on to say that the accident occurred September 19, 1952, near Norristown, Pennsylvania, while he was working for the defendant as an engineer and that he "* * *" suffered severe and permanent injuries by reason of a defect in the improperly constructed seat and seating arrangement on the locomotive of the defendant." The second suit is under the Employers' Liability Act. In it appellant asserted that on July 9, 1954 at appellee's Sunnyside (Long Island, N.Y.) Yards he "* * *" suffered severe and permanent injuries by reason of a yard mechanic negligently opening a door inward on the engine and striking plaintiff while he was working." The injury urged was aggravation of the back condition allegedly resulting from the Norristown accident. The two causes were consolidated for trial on plaintiff's motion.

According to plaintiff's first action the engine seat interfered with the safe operation of the locomotive because it interfered with the independent brake valve. He therefore tried to remove the back-rest and while tugging and yanking at it he fell backward and was hurt. At the pre-trial conference plaintiff's theory of liability was clearly stated as arising from the dangerous condition of the seat. His trial memorandum repeated this as did his opening address to the jury. The trial followed the same pattern and summation for appellant gave the jury the trouble with the seat as the sole issue. On the fourth trial day and after plaintiff had rested, his attorney, giving an opinion citation to the court, said "* * * may I just give you one thought in connection with this case * * * Now so that among other things Your Honor will understand our position in this case on the liability, as far as the Boiler Inspection Act is concerned and in so far as the brakes are concerned, safety appliances, it is covered by Section 11, 35 U.S.C.A." This and requests to charge with exception to their denial are the only references prior to verdict of a contention of a defective brake as such. In the course of plaintiff's motion

for a new trial there was a closely argued question of whether the independent brake was a Safety Appliance under the Safety Appliance Acts covering brakes, 45 U.S.C. Section 1. It appeared highly questionable that the auxiliary independent brake, which was not known when this particular part of the law was adopted, was a safety appliance within the section.[3] Then plaintiff went to his present position here argued that the independent brake was a defective appurtenance under the Boiler Inspection Act because of the contact between it and the seat-rest when the latter was so turned that it and whoever might be occupying it faced the rear of the locomotive.

Though the shift of position came too late and irrespective of its tenuous foundation and no covering request to charge, examination of the record reveals the court squarely placed before the jury plaintiff's proposition that his injury proceeded from the fundamental fact, as the court said, that "* * * the seat would not turn 360 degrees; that is turn completely around, that when it was turned it hit the brake valve lever * * *." The court continued, telling the jury that "* * * it is your duty to determine from the testimony on this phase of the matter whether or not the seat was defective or not in good condition." Then the court said "If in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff." True the judge did not repeat this in terms of it being a jury question whether the brake was a defective appliance under the Boiler Inspection Act if there was such contact but he had given the jury a practical formula for its guidance on this branch of the problem. It could not be misunderstood. If the jury had concluded that contact between the seat and the brake lever had created a

3. 45 U.S.C. Sections 1, 9, 11; United States v. Erie R.R., 237 U.S. 402, 407-408 (1915); Richmond F. & P.R. Co. v. Brooks, 197 F.2d 404, 407 (D.C. App. 1952).

defective condition, irrespective of whether it was attributed to the seat or to the brake, if that condition was a proximate cause of the accident, the jury was bound to render a verdict in plaintiff's favor. The actual verdict must be accepted as a finding to the contrary.

Appellant complains about the refusal to charge his request with reference to no necessity of proving the precise defect that caused the back-rest to snag. There is no substance to the objection. The court established the widest possible latitude for plaintiff's evidence in this connection saying:

> "On the other hand, if you find by the preponderance of the evidence the seat was defective or in bad condition, then you must next consider whether the defective seat was a contributing cause of the plaintiff's injury.
>
> "If, in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff."

In the circumstances of the case we find no error in the court's instruction regarding unnecessary peril. After reading the pertinent part of the Boiler Inspection Act the court said:

> "I charge you, Members of the Jury, that the defendant railroad, Pennsylvania Railroad in this case, was under a duty to see that the locomotive, to which the plaintiff in this case was assigned, and its appurtenances, one of which was the seat in question, was maintained in good condition so that it could be employed in the active service of the carrier without unnecessary peril to the life and limb of the plaintiff.
>
> "In other words, the defendant, the Pennsylvania Railroad, has an absolute and continuing duty to pro-

vide and maintain its locomotive and the attached apparatus and appurtenances so as to provide a safe place to work for its employees.

"When you say 'safe,' however, you must consider 'safe' in the context here and remember what sort of places and equipment the railroad has to do with. When you say 'safe' in connection with a locomotive, you don't mean the same thing as you would if you used the word 'safe' in connection with the parlor floor, or the front or back door of your home.

"A locomotive cannot be made 'safe' in that sense. It is a piece of equipment that necessarily can injure people. So that when you talk about 'safe' it is being used in connection with a locomotive and is qualified here by the statement in the section of the Boiler Inspection Act, 'that the same may be employed in the active service of such carrier without unnecessary peril to life and limb * * * ' It does not say 'any peril to life or limb'; it says, 'without unnecessary peril to life or limb * * *'"

As we have already seen, under the charge, if the jury found the seat defective, it did not have the further step of determining that it was an unnecessary peril before it could arrive at a plaintiff's verdict. Once the defect was established and the jury concluded it contributed to the accident, a decision in favor of the plaintiff was required by the instruction of the court.

Complaint is made that the court improperly refused to charge that assumption of risk was no defense to the first suit under the Boiler Inspection Act.

The trial judge categorically laid down the correct rule in his charge that:

"A railroad employee does not assume the risk of his employment."

In addition the entire mechanics of submitting the Norristow occurrence to the jury eliminated any idea of assumption of risk. The judge told the jury if it found a seat defect which contributed to the accident there should be a verdict for the plaintiff. He added: "There is no question of any contributory negligence in this case. In other words any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you." This element, which was not really a trial problem at all, was discreetly and properly disposed of by the court.

Appellant's next point has to do with two statements in summation by defense counsel. Attempt is made to bring the first of these under our decision in Straub v. Reading Company, 220 F.2d 177 (3 Cir. 1955). In Straub affirmative reference was made in summation to a statement which was not in evidence. Here the attorney for the plaintiff in summation had presented an interpretation of an interrogatory and its answer unfavorable to the defense and which was open to attack. That was replied to without timely objection. We find nothing of substance in this connection. The second statement reads:

> "The only other person who might be able to help us on this was Lawler, the fireman. He's out of the service, not working for the railroad and presumably the plaintiff can't find him, so none of us have the benefit of his testimony in this cause."

Appellant argues that the last phrase in the above could only leave the inference that the railroad was anxious to have Lawler present as he would be a favorable witness for it. That reason was offered to the district court some two months after the entry of judgment. The court dismissed it as not within 59(b) of the Rules of Civil Procedure. Aside from that the language, if it is to be read with appellant's glasses, must be taken to mean that

Lawler would have been a helpful witness for both sides. The point is de minimis.

In this long bitterly contested trial the patient competence of the trial judge was the notably commendable feature. He dealt with both sides fairly. Plaintiff had his full day in court. The jury verdicts have sound foundation in the record. There was no substantial error by the trial judge in his rulings or in his charge.

The judgments of the district court will be affirmed.